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Docket No. _____

IN THE
Supreme Court of the United States

October, 1983 Term

In Re: Martin Steel Corporation and Lloyd O. Shawber

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the United States Court of Appeals for the Eighth Circuit's erroneous reading of 28 U.S.C. § 1447(c) and (d), and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), in its orders of January 30, and February 2, 1984 violate the Congressional intent of § 1447 as explained in *Thermtron*?

PARTIES

Petitioners:

Martin Steel Corporation,
Lloyd O. Shawber.

Respondents:

Owatonna Elevator Company,
Chicago-Eastern Corporation,
Mid-State Bolt and Nut Company, Inc.
Industrial Fasteners, Inc.

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REPORT REFERENCES

The United States Court of Appeals for the Eighth Circuit issued unpublished orders in *In Re: Martin Steel Corporation and Lloyd O. Shawber*, No. 83-2668, and *In Re: Industrial Fasteners, Inc.*, No. 83-2706, dated January 30, and February 2, 1984.

STATEMENT OF GROUNDS

Review is sought pursuant to 28 U.S.C. § 1254(1) of Orders of the United States Court of Appeals for the Eighth Circuit dated January 30, and February 2, 1984, denying review on jurisdictional grounds of an order of the United States District Court, District of Minnesota, dated November 18, 1983.

STATUTES

28 U.S.C. § 1447. Procedure after removal generally

....

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(As amended May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, Pub.L. 88-352, Title IX, § 901, 78 Stat. 266.)

STATEMENT OF THE CASE

On August 21, 1981, Respondent Owatonna Elevator Company¹ sued diverse and non-diverse defendants, including Petitioner Martin Steel Corporation,² in Steele County District Court, Third Judicial District, State of Minnesota. On January 3, 1983, plaintiff interposed an Amended Complaint which named additional diverse and non-diverse defendants, including Petitioner Lloyd Shawber.³ After a hear-

¹Owatonna Elevator Company is a Minnesota corporation with its principal place of business in Owatonna, Minnesota.

²Martin Steel Corporation is an Ohio corporation with its principal place of business in Mansfield, Ohio. It is not a subsidiary nor does it hold any subsidiaries.

³Lloyd Shawber is a resident of Mansfield, Ohio.

ing on October 12, 1983, the Steele County District Court entered orders on October 21, and October 26, 1983, dismissing with prejudice all non-diverse defendants.

On October 17, 1983, the diverse defendants, including Martin Steel Corporation and Lloyd Shawber, petitioned for removal to the United States District Court, District of Minnesota. Upon learning that the orders for dismissal were executed on October 21 and October 26, 1983, rather than on October 12, 1983, the date of the dismissal hearing, the diverse defendants amended their petition for removal and refiled it on November 15, 1983.⁴

On November 18, 1983, the United States District Court remanded the action to the state court. The remand order stated:

A review of the file in this case indicates that it was initiated in Minnesota State District Court at Austin in 1981. The State District Judge, the Hon. William J. Nierengarten, has been deeply involved in the pre-trial proceedings. He has supervised discovery, issued a number of orders, severally reprimanded counsel for their conduct, established a discovery termination date and set a trial date which is imminent.

After all this had been done, defendants filed a petition for removal. It is very doubtful if the petition for removal was filed within the required statutory period after removability was ascertained and, at all events, it would make little sense to try the case here given Judge Nierengarten's long and deep involvement. It would be unseemly and at variance with established principles of comity for the federal court to now intervene and thus abort state court jurisdiction.

⁴Both the original Petition for removal and the Amended Petition were filed within time limits prescribed by 28 U.S.C. § 1446(b).

It is ordered that this case is remanded to the Minnesota District Court for the Third Judicial District.

On December 12, 1982, Martin Steel Corporation and Lloyd Shawber filed a petition for a Writ of Mandamus, seeking review of the November 18, 1983, order remanding the case. On January 30, 1984, the United States Court of Appeals for the Eighth Circuit issued an order denying the mandamus petition and stated:

Martin Steel Corporation and Lloyd O. Shawber seek a writ of mandamus vacating a district court order which remanded the case of *Owatonna Elevator Company v. Martin Steel Corporation*, No. 3-83-1298, to state court. As we view the district court's order, the case was remanded because the petitioners had failed timely to remove from state to federal court, stating that "it is very doubtful that the petition for removal was filed within the required statutory period after removability was ascertained . . .

We believe the district court's determination that the case had been improvidently removed is within the bounds of 28 U.S.C. § 1447(c). See *Royal v. State Farm Fire & Casualty Company*, 685 F.2d 124, 127 (5th Cir. 1982); *Robertson v. Ball*, 534 F.2d 63, 65 N. 2 (5th Cir. 1976). Hence, the remand order is not reviewable in this court. First, pursuant to 28 U.S.C. § 1447(d) removal orders are not reviewable unless the order is based on grounds wholly different from those permitted by § 1447(c). Second the section "prohibits review of all remand orders issued pursuant to § 1447 (c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976).

It is ordered that the petitions for writ of mandamus are denied.

This order was amended on February 2, 1984, to include denial of the petition by another diverse defendant, Industrial Fasteners, Inc., who had joined Martin Steel Corporation and Lloyd Shawber in petitioning for a Writ of Mandamus.

Martin Steel Corporation and Lloyd Shawber, now, petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

The district court based its decision to remand to the state court on the grounds that "[i]t would be unseemly and at variance with established principles of comity" for the federal court to assume jurisdiction of this case.

28 U.S.C. § 1447(c) and (d), as interpreted in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1936), establishes the basis for the return of a removed case to a state forum. Remand that does not comply with the statutory provision, as construed by *Thermtron*, is forbidden and beyond the authority of a district court.

Subdivisions (c) and (d) of § 1447 permit a remand only when a suit has been "removed improvidently and without jurisdiction." The grounds for remand mandated by these subsections are exclusive in that a remand cannot exceed its statutory definition. An order that purports to remand on grounds that a suit was "removed improvidently and without jurisdiction" is not subject to review in a court of appeals, even if remand was clearly erroneous. But, if the remand is on grounds not provided for by § 1447, subds. (c) and (b), a limited review is available by writ of mandamus.

In the instant case, the District Court remanded on grounds wholly different from those provided for by subsections (c) and (d). Its order remanding considered procedural actions of the state court, the imminence of trial, and the principles of comity; none of these considerations are recognized by the statute as a basis for remand. The District Court intimated that removal was untimely but clearly based its decision on its perception of comity and orderly judicial administration. The Eighth Circuit read this ambiguous part of the District Court's order remanding and erroneously concluded review was barred. The off-hand comment by the district court that it was "doubtful" that the demand for removal was timely filed was clearly not the basis for the district court's action; rather, the district court was motivated solely by concerns of comity and orderliness of the judicial proceedings—grounds wholly analogous to the trial court's improper concern for its crowded docket in *Thermtron*:

The determining factor was the District Court's heavy docket, which respondent thought would unjustly delay plaintiffs in going to trial on the merits of their action. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether this cause was removed "improvidently and without jurisdiction" within the meaning of the statute.

Thermtron, 423 U.S. at 344. Likewise, the federal district court's concerns in this case for orderliness or comity are not among the grounds specified by Congress for remand. The Eighth Circuit's denial of review by mandamus perpe-

tuates a wrongful denial of a federal forum to diverse defendants, contrary to the Congressional intent to permit diverse defendants access to federal forums. *Powers v. Chesapeake & O. Ry.*, 169 U.S. 92 (1898).

Deprivation of a Congressionally granted right through erroneous readings of federal statutes and this Court's precedent, without sufficient findings to justify remand or denial of review, is arbitrary and unjust. The Petition for a Writ of Certiorari should be granted to assure the Petitioners, and others,¹ their Congressional right to a federal forum.

Respectfully submitted,

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¹In this case and others, lower courts are now erroneously using perceived practical considerations to justify remand contrary to the statute. Another district court within the Eighth Circuit recently wrote:

A court could more appropriately address the propriety of remand by considering the following set of factors:

- 1) The nature and gravity of the defect in removal;
- 2) Principles of comity and judicial economy;
- 3) Relative prejudice to the parties, including deference to the plaintiff's choice of forum; and
- 4) Actions taken by the party seeking remand that imply it has affirmatively sought the federal court's intervention.

Midwestern Distribution v. Paris Motor Freight Lines, 563 F.Supp. 489, 493 (E.D. Ark. 1983). (Considering whether a right to remand had been waived.)

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APPENDIX

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

Owatonna Elevator Co., a Minnesota corporation,
Plaintiff,

vs.

Martin Steel Corporation, Chicago-Eastern Corporation,
Mid-State Bolt & Nut Company, Inc., Industrial Fasten-
ers, Inc., and Lloyd Shawber,
Defendants.

ORDER

Civ. 3-83-1298

A review of the file in this case indicates that it was initiated in Minnesota State District Court at Austin in 1981. The State District Judge, the Honorable William J. Nierengarten, has been deeply involved in the pretrial proceedings. He has supervised discovery, issued a number of orders, severely reprimanded counsel for their conduct, established a discovery termination date and set a trial date which is imminent.

After all this had been done, defendants filed a petition for removal. It is very doubtful if the petition for removal was filed within the required statutory period after removability was ascertained and, at all events, it would make little sense to try the case here given Judge Nierengarten's

long and deep involvement. It would be unseemly and at variance with established principles of comity for the Federal Court to now intervene and thus abort State Court jurisdiction.

IT IS ORDERED THAT this case is remanded to the Minnesota State District Court for the Third Judicial District.

Dated: November 18, 1983.

EDWARD J. DEVITT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2668

In Re: Martin Steel Corporation and Lloyd O. Shawber,
Petitioners.

No. 83-2706

In Re: Industrial Fasteners, Inc.,
Petitioner.

On Petition for Writ of Mandamus

Filed: January 30, 1984

Before HEANEY, ROSS and FAGG, Circuit Judges.

ORDER

Martin Steel Corporation and Lloyd O. Shawber seek a writ of mandamus vacating a district court order which remanded the case of *Owatonna Elevator Co. v. Martin Steel Corporation*, No. 3-83-1298, to state court. As we view the district court's order, the case was remanded because the petitioners had failed timely to remove it from state to federal court, stating that "it is very doubtful if the petition for removal was filed within the required statutory period

after removability was ascertained * * *." We believe the district court's determination that the case had been improvidently removed is within the bounds of 28 U.S.C. § 1447(c). See *Royal v. State Farm Fire and Casualty Co.*, 685 F.2d 124, 127 (5th Cir. 1982); *Robertson v. Ball*, 534 F.2d 63, 65 n.2 (5th Cir. 1976). Hence, the remand order is not reviewable in this court. First, pursuant to 28 U.S.C. § 1447(d) removal orders are not reviewable unless the order is based on grounds wholly different from those permitted by section 1447(c). Second, the section "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976).

IT IS ORDERED that the petitions for writ of mandamus are denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2668

In Re: Martin Steel Corp. and Lloyd O. Shawber,
Petitioners.

No. 83-2706

In Re: Industrial Fasteners, Inc.,
Petitioner.

On Petition for Writ of Mandamus

Filed: February 2, 1984

Before HEANEY, ROSS and FAGG, Circuit Judges.

AMENDED ORDER

Martin Steel Corporation and Lloyd O. Shawber and Industrial Fasteners, Inc. seek writs of mandamus vacating a district court order which remanded the case of *Owatonna Elevator Co. v. Martin Steel Corporation*, No. 3-83-1298, to state court. As we view the district court's order, the case was remanded because the petitioners had failed timely to remove it from state to federal court, stating that

"it is very doubtful if the petition for removal was filed within the required statutory period after removability was ascertained * * *." We believe the district court's determination that the case had been improvidently removed is within the bounds of 28 U.S.C. § 1447(c). See *Royal v. State Farm Fire and Casualty Co.*, 685 F.2d 124, 127 (5th Cir. 1982); *Robertson v. Ball*, 534 F.2d 63, 65 n.2 (5th Cir. 1976). Hence, the remand order is not reviewable in this court. First, pursuant to 28 U.S.C. § 1447(d) removal orders are not reviewable unless the order is based on grounds wholly different from those permitted by section 1447(c). Second, the section "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976).

IT IS ORDERED that the petitions for writ of mandamus are denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT